SABAH CREDIT CORPORATION

v.

WILAYAH FABRICATION SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
SULONG MATJERAIE J
[CSK: 22-54-1995]
15 JULY 2005

CONTRACT: *Loan - Agreement - Breach of - Demand for payment - Amount claimed in letter of demand reduced - Variation of figures - Whether prejudicial to defendant - Whether loan settled within prescribed time of 30 months - Failure to settle loan - Whether plaintiff could recall facilities in accordance with loan agreement - Whether plaintiff empowered to demand for payment - Whether issuance of demand by plaintiff proved - Whether claim of plaintiff proved*

CONTRACT: *Guarantee - Demand for payment - Whether issuance of demand proved - Guarantor - Whether third defendant as guarantor could be held liable as principal debtor - Whether claim of plaintiff proved*

By a loan agreement dated 11 July 1989 ('the loan agreement') the plaintiff granted the first defendant a loan facility in the sum of RM3 million. By a guarantee agreement, the second and third defendants jointly and severally guaranteed to pay the plaintiff for all advances made to the first defendant up to a total sum of RM3 million together with interest thereon from the date of demand for payment. In breach of the loan agreement, the first defendant failed to regularise the loan facility granted and as at January 1995 the outstanding loan together with the agreed interest in arrears due to the plaintiff was RM3,283,885.12, the amount which the plaintiff thus claimed against the first defendant. As against the second and third defendants jointly and severally, the plaintiff claimed the sum of RM3 million, interests and costs. However, submissions by defence counsel herein was only in respect of the first and third defendants as action against the second defendant, deceased, had been discontinued pursuant to a court order.

Held (judgment for the plaintiff):

[1] After hearing testimonies from witnesses in court, the said amount of RM3,283,885.12 that plaintiff had claimed in their letter of demand to the first defendant was reduced to RM2,537,170.08. Any variation of the figures after a full trial would not prejudice the defendant especially so when the amount the defendant was required to pay was substantially reduced. (pp 37 g-h & 38 e)

[2] It was argued for the first defendant that it had regularised the loan facilities and that witnesses, accountants for the plaintiff (PW3 and PW4), have testified that repayments were made though not enough to settle the amount outstanding. It was further argued that from the statement of account a payment was made in March 1995 after the notice of demand dated 13 February 1995. The court, however, could not accept this argument as it was a term of the loan agreement that the loan must be settled within 30 months. The loan agreement was executed on 11 July 1989 and it should therefore have been settled on 11 January 1995. (p 38 f-g)

[3] Clause 12 of the loan agreement allows the plaintiff to demand for payment upon the happening of any event in default at cl. 13 thereof. Clause 13(a) thereof stipulates that the plaintiff can demand for payment if the defendant fails to pay when due, any sum of interest instalment or principal or other sums or money when due hereunder in accordance with the terms of the loan agreement. As the defendant herein had failed to settle the loan, the plaintiff could properly recall the facilities in accordance with the loan agreement. The said clauses empowered the plaintiff to demand for payment. (p 39 a-b)

[4] Evidence was adduced in court to prove the issuance of the notice of demand by the plaintiffs' solicitors. The first and third defendants did not show that there was any other address known by the Bank before the posting of the letters, hence their defence of not receiving the letters of demand remained a bare denial as they were deemed to have received the said letters by virtue of the deeming provision in the loan agreement and the guarantee. (p 40 a-b)

[5] The defendant's argument that the third defendant, being a guarantor, could not be liable as a principal debtor was untenable as cls. 1(c), 15 and 16 of the guarantee stipulates that the third defendant agreed to bear liability as the principal debtor and could not argue that his liability is secondary to that of the first defendant. (p 40 c)

[6] The plaintiff has proven its claim on a balance of probabilities. The defendants on the other hand failed to produce any evidence to support its defence. In the circumstances, the court gave judgment for the plaintiff in the sum of RM2,537,170.08 against the first and third defendants jointly and severally together with statutory interest of 8% per annum from date of judgment to the date of payment and costs to be taxed unless agreed. (p 40 d-e)

Case(s) referred to:

BSN Commercial Bank (M) Bhd v. KDG Holdings (M) Sdn Bhd [1999] 2 CLJ 180 HC ***(refd)***

Chung Khiaw Bank Malaysia Bhd v. Raju Jayaraman Kerpaya [1995] 1 LNS 51 ***(refd)***

Public Bank Bhd v. Chan Siok Lie & Ors [1989] 2 MLJ 305 ***(refd)***

Shell Marketing Co Borneo Ltd v. Wee Boon Ping [1990] 1 CLJ 564; [1990] 3 CLJ 88 HC ***(refd)***

Sungei Way Leasing Sdn Bhd v. Goh Nai Khoo [1997] 2 CLJ Supp 541 HC ***(refd)***

For the plaintiffs - Chan Wai Ling (Clement Chaim with him); M/s Nicholas Fung Tokuzip & Co

For the 1st & 3rd defendants - Sugumar Balakrishnan (Natasha Isabelle S Balakrishnan with him); M/s Sugumar & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Sulong Matjeraie J:

The plaintiffs were and are at all material times a duly licensed finance company carrying on its business at Wisma Perbadanan Pinjaman Sabah, Pekan Baru Donggongon, Penampang, Sabah and the 1st defendant is a company incorporated in Malaysia having its place of business at Jalan Ranca-Ranca Industrial Area, P.O. Box 161, 87008 Labuan.

By a loan agreement dated 11 July 1989 ("the loan agreement") the plaintiffs granted the 1st defendant a loan facility in the sum of RM3 million with the following terms:

(1) Interest at the rate of 12% per annum on monthly rests on every sum advanced;

(2) The 1st defendant agreed to pay the principal sum with the agreed interest rate, commission, discount and other usual charges 30 months from the date of the loan agreement by deducting a minimum of 30% of all the assigned payment received from Shell Group of Companies;

(3) The loan facility was further secured by:

(i) a deed of debenture dated 11 July 1989;

(ii) charge on TL 207520125, TL 207520143, TL 207520456, CL 205313720, NT 203057550 and NT 5437 all situated in the Federal Territory of Labuan;

(iii) Joint and Several guarantee of the 2nd and 3rd defendants executed on 7 June 1989;

(iv) A deed of assignment to assign all monies interest due and payable to the 1st defendant by Shell Group of Companies up to a minimum 30% of such payments to the plaintiffs.

By a guarantee agreement dated 7 June, 1989, the 2nd and 3rd defendants and another jointly and severally guaranteed to pay the plaintiffs for all advances made to the 1st defendant up to a total sum of RM3 million together with interest thereon from the date of demand for payment.

In breach of the loan agreement, the 1st defendant failed to regularise the loan facility granted and as at January 1995 the outstanding loan together with the agreed interest in arrears due the plaintiffs was RM3,283,885.12, the amount which the plaintiffs are claiming against the 1st defendant with an agreed interest thereon at the rate of 12% per annum from 1 February 1995 until payment and costs.

During the trial and particularly after hearing the testimonies of PW3 Ms. Chong Nyuk Yun and PW4 Mr. Sylvester Golou Asai, the amount claimed against the defendants by the plaintiffs had been reduced to RM2,537,170.08.

As against the 2nd and 3rd defendants jointly and severally, the plaintiffs are claiming the sum of RM3 million, interests and costs.

Defence

The submission by learned defence counsel here is only in respect of the 1st and 3rd defendants as action against the 2nd defendant, a deceased, had been discontinued pursuant to a Court Order dated 26 August 2002.

Four main issues were canvassed by the defendants and these are:

(1) Did the 1st defendants fail to regularize the loan facility despite repeated requests and or demand by the plaintiffs?

(2) Did the 1st defendants receive the purported requests and/or demand to regularize the outstanding loan facility?

(3) Did the 3rd defendant receive the purported requests/demand including notice of demand dated 13 February 1995? and

(4) There is a variation between the amount demanded and the amount claimed by the plaintiffs.

At the outset, the learned counsel for the defendant applied to this court to be discharged as counsel. The application is at encl. 30. I refused the application. My reason is simple. Apart from the fact that the plaintiffs are objecting to any further adjournment, I have also directed on 19 August 2002, that the hearing date for this case was fixed for two days, 5 and 6 April 2004. These two dates have been agreed to by the parties. To my surprise learned counsel for the defendant told me that they only sent two letters to the client, the first one on 26 January 2004 almost 20 months after my direction and the second one was two days before the actual date of trial. As I have allocated these two days almost two years before the actual date couple with the fact that this is a pre-2000 case, I cannot allow further adjournment. Further, it is my belief that since counsel have been given the briefs very much earlier and that they have filed the defence to the statement of claim on 13 June 1995; instructions would have been given to them by then. Incidentally, learned counsel had in fact filed their written submission dated 22 July 2004 to this court on 23 July 2004. I therefore directed that the trial should proceed.

In the event, the plaintiff called four (4) witnesses while there was none from the defendant. Learned counsel for the defendant was however given the full opportunity to cross examine and accordingly cross-examined all the witnesses produced to the court. The four witnesses for the plaintiffs consisted of PW1, Ms. Fiona Valerie Gom, the Legal Officer at the Sabah Credit Corporation, PW2 Mr. Dickson Tsen Fen Fui @ Fun Fui, an advocate and solicitor, PW3 Ms. Chong Nyuk Yun, an assistant accountant of the plaintiff and PW4 Mr. Sylvester Golou Asai, an accountant with the plaintiff.

The total loan approved and disbursed to the 1st defendant was RM3million. After ascertaining all the figures produced in court the total amount paid by the defendants, including monies paid by the receivers and managers from the landed properties which had been foreclosed was RM3,214,897.23. The amount claimed by the plaintiffs in their letter of demand to the 1st defendant was RM3,283,885.12. Of course, the guarantors were only required to pay RM3 million that they promised to pay and were accordingly demanded the said sum. After hearing testimonies from the witnesses in court, this figure was reduced by the plaintiff to RM2,537,170.08. This uncertainty of figures led the learned counsel for the defendant to quote the case of *Sungei Way Leasing Sdn. Bhd. v. Goh Nai Khoo* [1997] 2 CLJ Supp 541 which says that it was good sense that the guarantor should know the amount he has to pay. Indeed,

I respectfully agree with such sentiment. However, as in this instant case, if the amount now demanded by the plaintiff is much less than the actual amount that one is required to pay, I suggest that it will not prejudice the guarantor. How could the guarantor complain? The letter of demand says that he needs to pay RM3 million and as it turns out he needs only pay RM2,537,170.08. Similarly in the case of the 1st defendant the amount demanded was RM3,283,885.12 and now it needs only pay RM2,537,170.08. They cannot be prejudiced by such reduction of figures. I find comfort in the ruling of Shankar J (as he then was) in *Public Bank Bhd v. Chan Siok Lie & Ors* [1989] 2MLJ 305 where he said, *inter alia*, at p. 308: "Nor is there any general rule that in all cases, unless the precise amount owing is correctly stated in a notice, the notice will be invalidated." Similar decision was made in *Shell Marketing Co. Borneo Ltd v. Wee Boon Ping* [1990] 1 CLJ 564; [1990] 3 CLJ (Rep) 88. Abdul Hamid Mohamed J (as he then was) said in *Chung Khiaw Bank Malaysia Berhad v. Raju Jayaraman Kerpaya* [1995] 1 LNS 51: "It should be pointed out that in the present case, my decision was given after a full trial. It would be most unjust if, just because the notice demanded a few ringgit more than the amount the court, after a full trial, found to be due, the debtor is relieved from paying the whole amount due and owing. Furthermore, in this case, the fact that the notice demanded a slightly larger amount to be paid could not in any way prejudice the defendant as the defendant did not pay anything at all." With respect, I fully agree with the sentiment expressed and therefore rule that any variation of the figures after a full trial in this instant case cannot possibly prejudice the defendants especially so when the amount the defendant is required to pay is substantially reduced. The figure of RM2,537,170.08 is accepted and this will replace the amount of RM3,283,885.12 being the total sum demanded.

Based on the submission at encl. 40, learned counsel for the defendant argued in court that the 1st defendant had regularized the loan facilities and suggested that PW3 and PW4 have testified that repayments were made though not enough to settle the amount outstanding. Further it was argued that from the statement of account a payment was made in March 1995 after the notice of demand which was dated 13 February 1995. I cannot however accept this argument as it is a term of the loan agreement that the loan must be settled within 30 months. The loan agreement was executed on 11 July 1989 and therefore it should be settled by 11 January 1995. No evidence was adduced to indicate that the plaintiff have agreed to any extension of the date of settlement.

As the defendant failed to settle the loan by then, the plaintiffs in my view could properly recall the facilities in accordance with the loan agreement. I fail to find within the loan agreement that there is a condition precedent that facilities cannot be recalled unless there is a repeated request to regularize the loan facilities. I could however find at cl. 12 of the loan agreement which allows the plaintiff to demand for payment upon the happening of any event of default at cl. 13 thereof. Clause 13(a) thereof stipulates that the plaintiff can demand for payment if the defendant fails to pay when due, any sum of interest instalment or principal or other sums or money when due hereunder in accordance with the terms of the loan agreement. To me this clause empowers the plaintiff to demand for payment.

The issue of wrongful termination was also brought up and argued at great length by learned counsel for the defendant, but as this was not pleaded, there is no need for me to say anything more on it. Learned counsel also dealt rather extensively on the notice of demand to both the 1st and 3rd defendants. Sadly, no evidence was adduced to say that they have not received any written notice and such evidence could not be produced because of the absence of the 1st and 3rd defendants. In any event, the letters of demand were sent in accordance with the addresses stated in the loan agreement as well as those found in the guarantee. Learned counsel for the defendants argued that those addresses were wrong but the defendants could have corrected them before they signed those documents. The plaintiff could not be faulted should the address be wrong.

The plaintiff had on 13 February 1995 sent a letter each to the 1st and 3rd defendants demanding the payment of the debt payable within 14 days. Those letters were sent by AR Registered post to their last known address and these modes of service were expressly authorised by the 1st and 3rd defendant as per cl. 35 of the loan agreement and cl. 18 of the guarantee. Clause 18 of the guarantee stipulates that "Any notice or demand hereunder shall be deemed to have been sufficiently given if sent by prepaid registered post to our addresses last known to the plaintiff or stated therein and shall be assumed to have reached us in the course of post." Similarly cl. 35 of the loan agreement provides: "Any notice or communication under or in connection with this loan shall be in writing and shall be delivered personally, or by post, telex or cable to the addresses given in this loan or at such other address as the recipient may have notified to the other parties in writing. Proof of posting or dispatch shall be deemed to be proof of receipt ..."

Evidence was adduced in court to prove the issuance of the demand by the plaintiffs' solicitors, PW2. Proof of service was tendered at pp. 80 and 81 of exh. P1. The 1st and 3rd defendants have not shown that there is any other address known by the bank before the posting of the letters, hence their defence of not receiving the letters of demand remains as bare denial as they are deemed to have received the said letters by virtue of the deeming provision in the loan agreement and the guarantee. Based however on the case of *BSN Commercial Bank (M) Bhd. v. KDG Holdings (M) Sdn. Bhd* [1999] 2 CLJ 180: "There having been no denial by affidavit by the defendants of receipt of demand, they must be taken to have received them ..." per Abdul Aziz J (as he was then).

Learned counsel for the defendants had also argued that the 3rd defendant being a guarantor cannot be liable as a principal debtor. This argument is untenable as cls. 1(c), 15 and 16 of the guarantee stipulate that the 3rd defendant agrees to bear the liability as the principal debtor and cannot argue that his liability is secondary to that of the 1st defendant.

I am satisfied therefore that the plaintiffs have proven their claim on a balance of probabilities. The defendant on the other hand failed to produce any evidence to support their defence. In the circumstances, I therefore give judgment for the plaintiff in the sum of RM2,537,170.08 against the 1st and 3rd defendants jointly and severally together with statutory interest of 8% per annum from the date of judgment to the date of payment and costs to be taxed unless agreed.